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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MAKBOUL AHMAD MAKBOUL, Defendant and Appellant.	E070133 (Super.Ct.No. BAF1701223) OPINION

APPEAL from the Superior Court of Riverside County. Jorge C. Hernandez, Judge. Affirmed with directions.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal, Andrew Mestman, and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Makboul Ahmad Makboul, pled guilty to stalking (Pen. Code § 646.9, subd. (c)(2); count 1),[1] violating a protective order (§ 273.6, subd. (a); count 2), and making criminal threats (§ 422; count 3). Defendant additionally admitted suffering a prior strike conviction (§§ 667, subds. (c), (e)(2)(A)) and a prior serious felony conviction (§ 667, subd. (a)). Pursuant to the plea agreement, the court sentenced defendant to an aggregate term of 10 years four months of incarceration, including a consecutive five-year term on the prior serious felony conviction enhancement.

On appeal, defendant contends the matter must be remanded to afford the trial court discretion, pursuant to the recently enacted Senate Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393), to determine whether to strike the prior serious felony conviction enhancement. We remand the matter to permit the court to exercise its newfound discretion. In all other respects, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

The victim testified she began dating defendant in November 2015. She first ended the relationship in April 2016. Defendant told her that relationships with him do not end until he ends them. Defendant began text messaging and calling her approximately 20 times daily.

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[1] All further statutory references are to the Penal Code.

[2] The parties stipulated the factual basis for the plea could be found in the preliminary hearing transcript. We take our factual recitation from the preliminary hearing transcript.

Thereafter, defendant started driving by the victim's work daily; he threatened a coworker with whom the victim carpooled. He yelled to the coworker: "'I'm going to kill you, "F-ing nigger[.]"'" He told the victim "that if he caught the bitch in the car with [her] that he would yank . . . her out of the car . . . ." The victim was scared for both herself and her coworker. The victim's employer eventually terminated her employment due to defendant's frequent "visits."

Defendant also came to the victim's house "[j]ust about every single morning" between April and May. He would start beating on the door as early as 3:20 a.m. It scared the victim.

The victim eventually informed defendant's parole officer regarding defendant's behavior. Defendant incurred a parole violation due to this behavior. Defendant was incarcerated for approximately 10 days. While he was incarcerated, most of the aforementioned behavior stopped; however, defendant still called her from jail.

Once defendant was released, the victim rekindled their relationship. Defendant told her that if he became incarcerated again due to her actions he would "'snap [her] neck.'" During this period, he twice brought a gun to her house. When asked if she was scared, the victim testified: "Not really. But, then again, yes, I was because he had just got out of jail. He was angry that he was in jail. He said that the inmates that he was in custody with said that they would take their wives or their girlfriends and send them to [her] house to do something to [her]." "That scared me." She believed that if she ever called the police he would snap her neck.

In August, she ended the relationship again. Defendant started texting and calling at all hours of the night. Defendant came over to her house 10 to 15 times daily; he would bang on the doors and windows asking to be let in. The victim's neighbor testified he saw and heard defendant yelling and banging on the victim's window. Defendant climbed on an adjacent trailer trying to look inside the victim's windows.

The victim testified defendant said he was going to "break out [her] windows and bust all [her] windows and come in and see what was going on . . . ." "I got pretty scared." He would call her and comment on what she was doing and wearing while inside her home.

Defendant's behavior continued until he became incarcerated in September after the victim called the police. She obtained a restraining order against defendant at the suggestion of an officer. Women started calling the victim telling her they had messages from defendant. She told them to stop calling.

Once defendant was released from custody in late October, he started driving through her mobilehome park honking his horn. He blocked her car with his vehicle on one occasion. The victim's neighbor saw defendant driving through the mobilehome park two or three times weekly. She started receiving "[a] lot" of phone calls again. On November 2, she went to the store; defendant came into the store and asked her to buy him gas and cigarettes. He had parked his car in front of hers.

The next day defendant kept driving through the victim's mobilehome park. She received phone calls and text messages from defendant. She called the police. She answered one of the phone calls while the responding officer was there. Officers thereafter took defendant into custody.

Defendant subsequently, repeatedly contacted the victim's employer's assistant attempting to have the restraining order dropped while defendant was incarcerated. The victim remained scared and feared for her safety.

II. DISCUSSION

Defendant contends the matter must be remanded to afford the trial court discretion, pursuant to S.B. 1393, to determine whether to strike the prior serious felony conviction enhancement.[3] We agree.

"On September 30, 2018, the Governor signed [S.B. 1393] which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the [previous] versions of these statutes, the court [was] required to impose a five-year consecutive term for 'any person convicted of a serious felony who previously has been convicted of a

[3] The court in *People v. Kelly* (2019) 32 Cal.App.5th 1013 held that a defendant must obtain a certificate of probable cause to seek a remand for the court to exercise its discretion pursuant to S.B. 1393. (*People v. Kelly*, *supra*, at p. 1016.) Here, defendant obtained a certificate of probable cause.

serious felony' (§ 667[, subdivision] (a)), and the court ha[d] no discretion 'to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.' (§ 1385[, subdivision] (b).)" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) "[S.B. 1393] applies retroactively to *all* cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final . . . ." (*Id.* at pp. 971-972, italics added; accord, *People v. Kelly*, *supra*, 32 Cal.App.5th at p. 1016.)

We initially note the general standard for assessing when remand is required for a trial court to exercise sentencing discretion: "'[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.]'" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) However, "if '"the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required."'" (*Ibid*.) Courts have applied this standard in the context of Senate Bill No. 620 (2017-2018 Reg. Sess.), which gave trial courts discretion to strike allegations subjecting a defendant to sentence enhancements under section 12022.53, where such discretion had previously been prohibited (former § 12022.53, subd. (h)). (*People v. McDaniels*, *supra*, at pp. 424-425; *People v. Chavez* (2018) 22 Cal.App.5th 663, 712-713.) We see no reason why this same standard would not apply in assessing

whether to remand a case for resentencing in light of S.B. 1393. Indeed, the People agree that authority pertaining to Senate Bill No. 620 is instructive.

We acknowledge that plea agreements are "'a form of contract,' and their terms, like the terms of any contract, are to be enforced. [Citations.] Unless a plea agreement contains a term requiring the parties to apply only the law in existence at the time the agreement is made, however, 'the general rule in California is that the plea agreement will be "'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.'"'" (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 57 (*Hurlic*); cf. *People v. Smith* (1997) 59 Cal.App.4th 46, 52 [matter remanded to court to exercise its post-*Romero*[4] discretion pursuant to § 1385 to strike a prior strike conviction where the defendant admitted the prior strike conviction as part of a plea agreement]; compare with *People v. Fuhrman* (1997) 16 Cal.4th 930, 945 ["[I]n the absence of any affirmative indication in the record that the trial court committed error or would have exercised discretion under section 1385 to strike the prior conviction if it believed it had such discretion, [*Romero*] relief on appeal is not appropriate in this context."].)

In *Hurlic*, *supra*, 25 Cal.App.5th 50, the court concluded that because the defendant's plea agreement did "not contain a term incorporating only the law in existence at the time of execution, [the] plea agreement [would] be 'deemed to incorporate' the subsequent enactment of Senate Bill No. 620 . . . , and thus give

[4] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

defendant the benefit of its provisions without calling into question the validity of the plea." (*Id.* at p. 57.) Thus, the court remanded the case to the trial court to exercise its discretion whether to lessen the defendant's sentence pursuant to amended section 12022.53, subdivision (h). (*Hurlic*, *supra*, at p. 59.)

Here, the plea agreement similarly did not include a term that defendant would not be subject to future changes in the law.[5] Thus, the general rule applies, and the plea agreement should be deemed to incorporate future changes in the law, such as S.B. 1393. (See *Hurlic*, *supra*, 25 Cal.App.5th at p. 57.) Moreover, "[i]t follows, also as a general rule, that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law." (*Doe v. Harris*, *supra*, 57 Cal.4th at pp. 73-74; accord, *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992-993.)

Furthermore, we cannot say the record shows the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to lessen

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[5] Had the People inserted, and defendant initialed, a provision of the plea agreement to prohibit future changes in the law from affecting defendant's sentence, the People's argument might have validity. (See *Doe v. Harris* (2013) 57 Cal.4th 64, 71; *Hurlic*, *supra*, 25 Cal.App.5th at p. 57.) Nevertheless, no such express provision prohibiting defendant from benefitting from future changes in the law which would be applied retroactively appear in defendant's plea agreement.

defendant's sentence. Nothing in the trial court's imposition of the stipulated sentence demonstrates what it would do with the newly afforded discretion under S.B. 1393. We conclude the trial court must be afforded the opportunity to exercise this discretion. (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425; *People v. Garcia*, *supra*, 28 Cal.App.5th at pp. 973-974.)

The People argue that *Doe* and *Hurlic* are distinguishable because they did not hold that the trial court possesses unilateral authority to alter a term of a plea agreement. *Doe v. Harris*, *supra*, 57 Cal.4th 64 explicitly held that the fact that "the parties enter[ed] into a plea agreement . . . does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them." (*Id.* at p. 66; accord, *Harris v. Superior Court*, *supra*, 1 Cal.5th at pp. 992-993.) By implication, this necessarily requires giving the trial court the power to alter a term of the plea agreement, here, the sentence. Likewise, *Hurlic* expressly held that a change in the law could be retroactively applied to a plea agreement to give the trial court discretion to alter a defendant's sentence. (*Hurlic*, *supra*, 25 Cal.App.5th at pp. 57-59.) Thus, *Doe* and *Hurlic* both support the proposition that trial courts have discretion pursuant to S.B. 1393 to alter a defendant's sentence even where the sentence was a term of the plea agreement.

Furthermore, we disagree with the People's argument that *Doe* is distinguishable because it solely addressed mandatory changes under Proposition 47, whereas S.B. 1393 involves discretionary power. Pursuant to Proposition 47, even if a defendant is found presumptively eligible for relief, the court still has discretionary, albeit circumscribed,

power to deny the request if it finds the defendant poses an unreasonable risk of danger to others. (*People v. Valencia* (2017) 3 Cal.5th 347, 374; *People v. Morales* (2016) 63 Cal.4th 399, 404, 407-408.) Thus, like the trial courts in *Hurlic* and *Doe*, in determining whether to grant Proposition 47 petitions, trial courts are required to exercise at least some degree of discretion; ergo, S.B. 1393 applies retroactively to give courts discretion to strike a prior serious or violent felony conviction enhancement.

We therefore remand the matter to the trial court with directions to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, as amended by S.B. 1393, to determine whether to strike the prior serious felony conviction enhancement. Pursuant to section 1385, to strike the enhancement the court must find that such action would be in "furtherance of justice." "'[T]he language . . . , "furtherance of justice," requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People* . . . . [Citations.]' [Citations.]" (*People v. Orin* (1975) 13 Cal.3d 937, 945-946.) If the court determines to strike the enhancement, it "must set forth the reasons for doing so in a minute order. [Citation.]" (*People v. Johnson* (2015) 61 Cal.4th 734, 769.) We express no opinion as to how the court should exercise its discretion on remand.

III. DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing the trial court to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, as amended by S.B. 1393, as to whether to strike the prior serious felony enhancement in

accordance with the views expressed herein. In all other respects, the judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.